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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 565

WRIGHT & TAYLOR, INC., *Petitioner*,
vs.
ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case on November 10, 1930, (R. 44) affirming the decision of the United States District Court for the Western Dis-

trict of Kentucky 34 Fed. (2d) 328, (R. 34), and respectfully shows to this honorable Court:

STATEMENT

This case involves the interpretation and constitutionality of Section 611, of the Federal Revenue Act of 1928, c. 852, 45 Stat. 791, 875.

In this case certain income taxes were collected under duress and protest after such collection was barred by limitation. Suit to recover the tax so illegally collected was duly instituted against the respondent Collector before the enactment of Section 611, Revenue Act of 1928. When such suit was instituted, petitioner had a right to recover against which the respondent had no defense. Unless the above-named section, which the Government now relies on as a defense, was intended to furnish a new defense, available even in pending suits against collectors, the petitioner was entitled to judgment. The claims in abatement alleged by the respondent to have "stayed" collection were filed more than five years before the statute of limitations expired. The respondent claims that Section 611 is to be construed as affording a defense available to the respondent herein; petitioner opposes this, asserting (a) the facts in this case do not support the Government's affirmative plea that the claims in abatement were what "stayed" collection, (b) the restriction of Section 611 was intended merely to affect refunds and credits of tax made in ordinary course by administrative officials under the provisions of law authorizing such administrative action (notably Section 607 of the Revenue Act of 1928) and does not establish a defense available in court, especially where a taxpayer sues a collector at common law to recover

taxes forcibly collected contrary to a statute of limitations, (c) Section 611 is not retroactive; if it is thought to be retroactive in any degree, it is so only as to voluntary payments of barred taxes and not as to compulsory payments, (d) if Section 611 is construed as intending to revive a tax liability which is not only barred but discharged by express provision of law, Section 611 is to that extent invalid as contravening the Fifth Amendment of the Constitution.

The facts were stipulated (R. 22) and were specially found by the District Court (R. 34). The petitioner on June 17, 1919, made its income tax return for the fiscal year ended June 30, 1918 (R. 22) and, upon the assessment of the tax shown to be due and of an additional tax, disputed the correctness of the assessments by filing claims in abatement on September 15, 1919 (R. 23). On December 13, 1923, the petitioner filed a "waiver" which had the effect of extending the five year statutory period for collection of this tax from June 17, 1924, to December 13, 1924, (R. 24). Neither the Commissioner nor the respondent took any steps toward collecting the unpaid assessments until September 8, 1925, when the respondent by threats of distraint forced the petitioner to pay the taxes assessed against it (R. 23, 24).

On September 30, 1925, the petitioner filed a claim for refund of the taxes so collected (R. 24) contesting the amount of the tax on the merits and on the further ground that the statutory period for collection had expired (R. 6-7). No action being taken by the Commissioner upon this refund claim, a suit was filed on April 14, 1927, in the District Court for the Western District of Kentucky (R. 1) in which the dispute as to the merits of the tax was abandoned because the

taxes had been illegally collected after the statutory period prescribed therefor (R. 1-5, 8-9) and this ground was sufficient to sustain the action. The respondent failed to answer until April 8, 1929, (R. 17) at which time he raised the defense that Section 611 of the Revenue Act of 1928 barred recovery. This contention was sustained by the District Court (R. 25) in an opinion rendered July 26, 1929, 34 Fed. (2d) 328.

The Circuit Court of Appeals in affirming the District Court recognized in its opinion (R. 44) that, had the case been decided prior to the passage of the Revenue Act of 1928, the petitioner would have been entitled to judgment against the respondent who had no authority to receive the money at the time of collection, the tax claimed having been barred by the statute of limitations of five years, found in Section 250(d) of the Revenue Act of 1921, and the liability discharged, citing Section 1106 (a), of the Revenue Act of 1926, 44 Stat. Part 2, 113. The court concluded, however, that Section 607, 611 and 612, of the Revenue Act of 1928, gave the respondent a valid defense and entered judgment (R. 44) affirming the decision of the District Court.

STATUTES INVOLVED

Sections 607, 611 and 612, of the Revenue Act of 1928, provide:

> "SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be consid-

ered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT. Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

QUESTIONS INVOLVED

The case involves the following questions:

(a) Whether the facts in this case support respondent's plea that collection was stayed by claim in abatement, within Section 611, Revenue Act of 1928.

(b) Whether the effect of Section 611, like Section 607 of the same law, was merely to prevent administrative authorities from making refunds and credits in ordinary course under the provisions covering such administrative acts, or whether it was also intended to furnish a defense in law suits, even suits against collectors.

(c) Whether Section 611 was intended to be retroactive in effect and, if so, whether it was intended to bar recoveries in cases other than those where pay-

ments were voluntarily made after the statutory period for collection.

(d) If Section 611 was intended to bar recoveries by suit in court in cases similar to the present, does the section to that extent violate the Fifth Amendment?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Burden, Smith & Company,* 33 Fed. (2d) 229, and was recognized so to be in the opinion below (R. 48).

2. The decision of the court below is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Heiner v. Erie Coal & Coke Company,* 42 Fed. (2d) 214, now pending in this Court on certiorari, No. 508, October Term 1930.

3. The case involves important questions which have not been and should be settled by this Court. These questions are of great public interest and have arisen in many jurisdictions, resulting in a hopeless conflict of judicial opinion.

4. Unless the writ is granted herein the rights of this petitioner cannot be preserved pending decisions of this Court as to the meaning and validity of Section 611 in other cases, now pending, in which this Court has granted writs of certiorari.

The Court has granted writs of certiorari in the case of *Graham & Foster, Co-partners etc. v. Goodcell, Collector,* No. 36, October Term, 1930, certiorari granted March 3, 1930; *Magee v. United States,* No. 65, October Term 1930, certiorari granted May 19, 1930; *Oak Worsted Mills v. United States,* No. 104, October Term

1930, certiorari granted June 2, 1930; *Taft Woolen Company v. United States,* No. 105, October Term 1930, certiorari granted June 2, 1930; and a number of other cases involving Section 611. None of the cases involving Section 611, in which certiorari has been granted, appear to raise questions which are in this case as to the effect of a waiver as a stay of collection in a case where illegal collection was had without the prior rejection of an abatement claim. Since, therefore, decisions in those cases will not necessarily decide all the issues raised in this case, the petitioner respectfully requests that, in the event this petition is granted, the case be advanced to be heard with the other cases involving Section 611, in order that the effect of Section 611, in cases such as this, may be considered by the Court in reaching its decision on the scope and validity of said Section.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit in the case numbered on its docket No. 5540, *Wright & Taylor, Inc. v. Robert H. Lucas, Collector of Internal Revenue for the District of Kentucky,* be granted; that the said decision be reversed and that this petitioner have such other and further relief as may be its right under the law.

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (R. 44-48), rendered November 10, 1930, has not as yet been reported. The opinion of the United States District Court (R. 25-33) is reported in 34 Fed. (2d) 328.

JURISDICTION

The decision of the Circuit Court of Appeals for the Sixth Circuit, the review of which is sought, was entered on November 10, 1930 (R. 44). Jurisdiction for the issuance of the writ is granted in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

STATEMENT OF THE CASE

The facts have been set forth in the petition. They show that respondent forced petitioner to pay money as taxes at a time when respondent had no right to collect the money, because the tax claim had been barred by the running of a period of time prescribed in the revenue law for collection of the taxes, and the liability for the taxes had been discharged. Petitioner sued respondent in April, 1927, to recover the money illegally exacted from it by the respondent, and was concededly entitled to judgment until May 29, 1928, when the Revenue Act of 1928 was approved. The court below held that, because petitioner had applied for the abatement of the taxes assessed against it, Section 611, of the Revenue Act of 1928, took away petitioner's right of recovery.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that Section 611 of the Revenue Act of 1928 applies to the facts in this case, notwithstanding the absence of any showing that the claims in abatement were influential in staying the Collector from enforcing payment.

2. In holding that Section 611 applies not only to purely administrative credits and refunds of the type mentioned in Section 607, but that it was also intended to furnish a defense in law suits against Collectors.

3. In holding that Section 611 is to be given retroactive effect, and in not holding that the retroactive effect, if any, is limited to voluntary payments of barred tax.

4. In holding that Section 611 shows an intention to revive a tax liability expressly discharged by law (in addition to being merely barred) and that, so construed, there is no violation of the Fifth Amendment to the Constitution.

5. In affirming the decision of the District Court, and failing to direct that judgment be entered for this petitioner.

ARGUMENT

Section 607 and Section 611 of the Revenue Act of 1928 are quoted in the petition.

1. Collection is not "stayed" unless some circumstances, legally or morally, tie the hands of the Collector, and the mere fact that abatement claims were filed does not show that collection was "stayed by" such filing (*United States v. Burden, Smith & Company*, 33 Fed. (2d) 229, conflicting with the decision

below). The respondent pleaded such a stay in this case but the facts do not show it. A claim in abatement is not a request for delay but merely asks (immediate) cancellation of the assessment. Regulations provide that the filing of a claim in abatement does not necessarily operate as a suspension of collection. Article 1032, Regulations 45 and Regulations 62. In this case the claims in abatement were filed more than five years before the collection became barred; a waiver was filed in December, 1923, extending the time for collection until December, 1924, but collection was not made until about a year after the waiver expired.

Having interposed an affirmative defense, the respondent had the burden of showing all the facts necessary to support it, especially since the facts as to the cause for delay in collection were peculiarly within the knowledge of the respondent. The Court below was not justified in presuming that the filing of the claims in abatement, rather than mere inaction, or other causes, was responsible for the five years' delay.

Since the petitioner's waiver put the respondent on notice to collect, it is not reasonable to suppose that his delay thereafter was due to the abatement claim. Indeed, since the waiver was against petitioner's interest, the reasonable presumption is that respondent demanded a waiver and elected to collect within the period specified therein. Section 611 was not intended to apply to cases of that character. House Report No. 2, 70th Congress, First Session, p. 34.

2. The court below concluded that Sections 607, 611 and 612, of the Revenue Act of 1928, were enacted in

order to relieve against the effect of the decision of this Court in *Bowers v. New York and Albany Lighterage Company,* 273 U. S. 346, and were intended to prohibit not only administrative refunds but recoveries in the courts. In this the court erred since only Section 611 has any relation to claims resulting from the decision in *Bowers v. New York and Albany Lighterage Company,* and said Section has no effect other than to prescribe that the illegal collection of assessed taxes under certain prescribed conditions "shall not be considered as an overpayment under the provisions of Section 607." Clearly, therefore, unless Section 607 reaches suits for repayments which were pending in the courts when the Revenue Act of 19.8 was approved, Section 611 can have no application thereto.

In *Heiner v. Erie Coal & Coke Company,* 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term 1930, it was held that these sections were not intended to operate as a defense in suits against collectors.

Section 1106 (a), of the 1926 Act, seemingly prohibited refunds and credits of taxes illegally collected after the statutory period therefor unless the tax had been overpaid, in the sense of never having been due. This Section, upon representations of the Government, was held by the courts to apply only to administrative refunds or credits and to have no effect as a bar to recoveries in the courts even though the illegal collections were not "overpayments." *Ellay Company v. Bowers,* 25 Fed. (2d) 637, certiorari denied 48 Sup. Ct. 601, *Thornhill Wagon Company v. Noel,* 17 Fed. (2d) 407, *Gove v. Nichols,* 23 Fed. (2d) 856. Section 612, of the Revenue Act of 1928, repealed Section 1106 (a), of the 1926 Act, and Section 607 provided that barred

collections should be *considered* overpayments and should be credited or refunded to taxpayers. It thus seems apparent that the sole purpose and effect of this Section was to authorize administrative action formerly prohibited by Section 1106 (a). It would follow that Section 607, like the Section which it superseded, was not intended to relate to recoveries in the courts.

The court below, in emphasizing that Section 611 provides that illegal "collections" in certain cases should not be considered "overpayments" and in reasoning that if there was no overpayment there could be no recovery, apparently lost sight of the fact that it is illegal collections, not "overpayments" in fact which are recoverable in the courts. *Graham v. Dupont*, 262 U. S. 234, *Bowers v. New York and Albany Lighterage Company*, supra, *Toxaway Mills v. United States*, 61 Ct. Cls. 363, reversed 273 U. S. 781, upon confession of error by the Solicitor General.

3. If Section 611 is to be given retroactive effect, it must be separated from Section 607, since that Section is plainly prospective in its provisions. Taken together, the two Sections seem to provide merely that if a claim for refund is filed, based upon Section 607, a credit or refund shall be allowed by the administrative authorities unless a situation described in Section 611 is found to exist, in which event the claim is to be disallowed. The claim for refund in the case at bar was filed, and this suit was brought long prior to the enactment of Sections 607 and 611, and nothing appears in either of these Sections which indicates a purpose to render these earlier proceedings in court of no effect.

The facts in the case at bar illustrate results from giving Section 611 retroactive effect, which strongly suggest that Congress did not intend that this Section should operate retroactively. Petitioner disputed the correctness of the Commissioner's assessments and filed claims in abatement (R. 23). The assessments were collected without final action on these claims (R. 23), and the issues were kept alive by a claim for refund (R. 6-7, 24). No action was taken on this claim and this suit was brought (R. 35). Quite apart from the merits of the assessments, it was recognized at the time of collection that the tax liability had been discharged by the expiration of the statutory period for collection, and that a right to recover for that reason existed. Under these circumstances petitioner was justified in basing its suit solely upon the fact that collection was had after the statutory period therefor (R. 1-9), since that fact rendered moot the issues formerly raised as to the correctness of the assessments.

It would seem plain that Section 611 was not intended to penalize the abandonment of issues as to the merits of the tax, such abandonment having been safe and proper when made.

If Section 611 was intended to have any retroactive effect it seems most reasonable to conclude that it was meant to apply in cases of voluntary payments made after the statutory period for collection, but not to cases where taxpayers did not share the erroneous belief of collectors, that there was no statutory limitation upon the time for collections by distraint, and resisted collection. The Section refers to *payments* instead of collections, and has been construed by the Commissioner as relating only to voluntary payments made

after its enactment. (Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82). If it so operates as to cases arising after its enactment, it ought to have the same meaning when applied retroactively.

If Section 611 applies only to voluntary payments, the results of the mutual mistake of law of taxpayer and collector may fairly be permitted to stand, and the Government would have relief against claims raised for the first time after the decision in *Bowers v. New York and Albany Lighterage Company*, supra. This relief should be substantial since the court below stated in its opinion (R. 47) that "Prior to the Bowers decision it was generally assumed that there was no limitation upon the collection of revenue by distraint."

(4) The court below erred in concluding that Congress in enacting Sections 607, 611 and 612 of the Revenue Act of 1928 intended to revive previously discharged liabilities for taxes and in concluding that such a result was within the power of Congress. The court's construction of the law conflicts with the decision of the Court of Appeals for the Third Circuit in *Heiner v. Erie Coal & Coke Company*, 42 Fed. (2d) 214, certiorari granted 1930, No. 508, October Term, 1930.

The limited scope of these three Sections has been heretofore pointed out herein. Certainly their express terms show no purpose to (a) repeal an existing statute of limitations, (b) give new legislative construction to an old statute, or (c) ratify illegal collections or otherwise to re-create liabilities, as the court below found was their effect.

The court below recognizes that failure of the respondent to collect within the period prescribed by the statute not only barred the remedy but discharged the

liability (Opinion R. 45). Section 1106 (a), of the Revenue Act of 1926, is cited. This Section was merely declaratory of the pre-existing law, and was enacted to settle doubts raised by the decision of the Court of Claims in *Toxaway Mills v. United States*, supra. (See House Report No. 356, p. 55, 69th Congress, First Session). The repeal of Section 1106 (a) by Section 612, of the Revenue Act of 1928, would not, therefore, operate to revive liabilities discharged or extinguished prior to the passage of the 1928 Act.

The suit in the case at bar is an action under the common law against the respondent in his individual capacity. *Smietanka v. Indiana Steel Company*, 257 U. S. 1, *Levy v. Wardell*, 258 U. S. 542. The action retains its common law basis, notwithstanding that the revenue laws prescribe conditions precedent to suit, and notwithstanding that, after judgment, the liability may be transferred to the United States. *Patton v. Brady*, 184 U. S. 608, *Sage v. United States*, 250 U. S. 33.

As thus viewed, the effect given to Section 611 by the court below is to destroy a right of action which petitioner had against the respondent as an individual. This plainly would be the taking of property without due process of law, and prohibited to the Congress by the Fifth Amendment. This Court has recognized that statutes having the effect of reviving or re-creating liabilities which have become extinguished through lapse of time violate the Fifth Amendment. *Danzer v. Gulf and Ship Island R. R. Company*, 268 U. S. 633, 636, *Davis v. Mills*, 194 U. S. 451.

If it be considered that the subject matter of the suit is primarily Federal taxes, and that Congress has the power to defeat recovery by ratifying the illegal col-

lection by the respondent, as in *United States v. Heinszen*, 206 U. S. 370, examination will show that Congress has not expressly ratified these illegal collections by any provisions of the Revenue Act of 1928. Express ratification has been held by this Court to be essential in other situations where illegal collections of taxes have been made. *United States v. Heinszen*, supra, *Lincoln v. United States*, 197 U. S. 419, and *De Lima v. Bidwell*, 182 U. S. 1.

It would seem that the most that can be said of Section 611 is that it directed the retention by the United States of moneys collected as taxes after liability therefor had become extinguished. This seems more nearly a direction to confiscate private property than the revival of a tax. Its non-taxing and confiscatory character more clearly appears if analysis is made of the cases in which citizens occupying positions essentially identical with this petitioner, are permitted to escape the liability found, by the court below, to have been created or revived by Section 611.

(a) Section 611 does not authorize the retention by the Government of moneys illegally collected where collection was stayed by claims for credit. (G. C. M. 6296—Cumulative Bulletin VIII 2, p. 152.)

(b) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82.)

(c) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the

Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(d))Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

(5) It is, therefore, respectfully urged that the Circuit Court of Appeals for the Sixth Circuit erred in affirming and not reversing the decision of the District Court below.

Respectfully submitted,

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
Counsel for Petitioner.